SUPREME COURT U. S.

No. 608

In the Supreme Court of the United States

OCTOBER TERM, 1970

LEO F. BAUER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
WILLIAM D. RUCKELSHAUS,
Assistant Attorney General,
MORTON HOLLANDER,
MICHAEL C. TOLLEY,
Attorneys,
Department of Justice,
Washington, D.C. 20530

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A8–A16) is reported at 427 F. 2d 215. The decision of the district court (Pet. App. A2–A6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1970. The petition for a writ of certiorari was filed on August 28, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below correctly concluded that the United States was not liable for petitioner's in-

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juries, caused by his fellow employees, while doing repair work on a government-owned vessel which had been turned over to petitioner's employer for reactivation from the "mothball fleet."

STATEMENT

Petitioner, an employee of Jacksonville Shipyards, brought this suit against the United States, as owner of the S.S. CAPE SAN MARTIN, seeking damages for personal injuries sustained on board that vessel while it was in drydock undergoing the repair and overhaul work necessary to reactivate it from the "mothball fleet." The repair work was done by Jacksonville pursuant to the general provisions of a "master lump sum repair contract," entered into in 1957, and specific job orders, relating to the CAPE SAN MARTIN, issued in 1966. Under the contract, Jacksonville had complete custody of and responsibility for the vessel (Art. 5; Resp. App., *infra*, p. 9). The government's only direct connection with the vessel was the presence on board of a marine surveyor, whose basic function under the contract was to inspect and test Jacksonville's work (Art. 4(c), Resp. App., *infra*, p. 11; App. 98, 104, 113–114),[1] and who testified that he had no contact with Jacksonville's workmen (App. 115) and did not supervise their work or the repair operation (App. 67, 111–112, 114–115, 119).

The contract required Jacksonville to "exercise reasonable care and use its best efforts to prevent

[1] "App." and "Supp. App." references are to the appendices filed in the court of appeals, copies of which we are lodging with the Clerk.

accidents, injury or damages to all employees * * *" (Art. 9(a), Resp. App., *infra*, p. 10); to use "the best commercial marine practice" with respect to "all workmanship, equipment, materials and articles, and all operational practices * * *" (Art. 4(a), Resp. App., *infra*, p. 9); and, at the request of the marine surveyor, to "place reasonable safeguards * * * to prevent accidents in spaces and areas in which" it was working (Art. 4(f), Resp. App., *infra*, p. 10). The contract gave the government the right to terminate the work covered by the job order for Jacksonville's failure to perform any of the provisions of the contract (Art. 26(a), Resp. App., *infra*, pp. 11–12).

Petitioner was employed by Jacksonville as a marine engineer. On the day he was injured, he had been assigned to remove two valves from a line under the ship's deck. When he arrived at his assigned place, he found other Jacksonville employees already there, cleaning the engine room of scale, rust and trash. They were using discarded five-gallon paint buckets to raise the debris out of the ship. This was a common practice (App. 82–83, 151, 180, 198; Supp. App. [2] 73–74) and was not dangerous unless the buckets, which weighed fifty pounds when filled with paint (Supp. App. [2] 15; see Pet. App. A11), were overloaded (App. 188; Supp. App. [2] 5, 9).

One of the men removing the debris asked petitioner to leave because of the conflict in work assignments (App. 187), but petitioner declined to do so. Shortly thereafter, the handle pulled out of a bucket which had been filled with a "rather light" load of

only ten to twenty pounds of debris (App. 192). The bucket fell ten or fifteen feet and struck the petitioner.

Petitioner sought recovery from the government on the theory that it had control over the operations of the contractor and was therefore under a duty, as vessel owner, to exercise reasonable care to provide the contractor's employees with a safe place to work; and that its inspector breached that duty by failing to order Jacksonville to discontinue using the paint buckets for hauling debris.

After a trial, the district court denied recovery to the petitioner. The court refused to make a proposed finding that the use of the paint buckets was an unsafe operational practice constituting a violation of the contract (Pet. App. A7; App. 406–407). It found that the petitioner's injuries had been caused solely by acts of his fellow employees and that no government employee had "participated in any way" in those acts (Pet. App. A3). The court further found that the government's inspector did not "supervise or participate in the work" which resulted in petitioner's injury (Pet. App. A5).

The court of appeals affirmed. Stressing testimony that the use of paint buckets was "the usual way" and was safe so long as the buckets were not overloaded (Pet. App. A11), the court held there was no evidence that the government inspector had knowledge of a dangerous defect (Pet. App. A14, n. 3). It held, in any event, that the government's retention of the right to inspect the work to insure compliance with the contract was not sufficient to impose on the government

the duty asserted by the petitioner (Pet. App. A12) and that it "plainly was not part of" the inspector's duties, "either under the terms of the contract or by tacit understanding," to "suggest alternative methods of raising debris from the engine room" (Pet. App. A14). It concluded that since "the Government had relinquished control of the vessel * * *, was not in control of the work area, the manner of detail performance, nor safety procedures, and it was not a duty of the single inspector on board to take control of same," this Court's decision in *West* v. *United States*, 361 U.S. 118, precluded relief to petitioner (Pet. App. A15–A16).

ARGUMENT

1. Both courts below correctly recognized that *West* v. *United States*, *supra*, required denial of the petitioner's claim. In *West*, the government had hired a contractor to overhaul and recondition a mothballed vessel. The contractor had complete responsibility for and control over the repairs, although the United States retained the right to inspect the work and materials to insure compliance with the contract. This Court stated it was manifestly unfair to place the duty of furnishing a safe place to work on a shipowner who had no control over the ship or the repairs when it was the work of repair that created the danger which made the ship unsafe. It therefore held that the government was under no duty to protect an employee of the contractor from risks that were inherent in carrying out the contract. 361 U.S. at 123. This was so despite the presence on board of six govern-

ment inspectors who, like the one inspector here, gave no orders and did not participate in the work or supervise its progress (*ibid.*).

Seeking to distinguish *West*, petitioner relies on the government's right to require Jacksonville to comply with the safety provisions of the contract as establishing sufficient "control" of the repair work to warrant imposing the duty on the government to exercise reasonable care to furnish a safe place to work. That reliance is misplaced. The contractual provisions involved in this case are substantially identical to those involved in *West* (see Resp. App., *infra*, pp. 9–12),[2] which this Court has already determined did not give the government the requisite "control over the vessel, or power either to supervise or to control the repair work." 361 U.S. at 119, 123. Consequently, the contractual provisions here provide no basis for distinguishing this case from *West* and raise no question warranting review by this Court.

2. The petitioner's factual assertion that the government inspector had knowledge of a dangerous condition, *i.e.*, the practice of using paint buckets to haul

[2] The provisions relied on by the petitioner are contained in the Master Lump Sum Repair Contract between Jacksonville's predecessor and the government (see p. 2, *supra*). That contract is in the 44-page standard form used by the National Shipping Authority (see 32A C.F.R. Chap. XVIII, SRM-5). In *West*, the contract involved (see Transcript of Record, No. 11, O.T., 1959, pp. 85, 121–122) was the standard form lump sum repair contract then utilized by the Maritime Administration. For the Court's convenience, we have set out in an Appendix hereto the provisions of the contract relied on by the petitioner here and the corresponding provisions of the *West* contract.

debris, was presented to and rejected by both courts below. Although the inspector may have been aware of that practice, the courts below accepted the testimony establishing that it was a customary one and not dangerous.[3] There is no occasion for further review of those factual findings. Since the petitioner has failed to establish the necessary factual predicate, there is no need to consider his contention that an inspector's knowledge of a dangerous condition would give rise to a duty in the government to correct that condition.[4]

3. Contrary to petitioner's assertion, there is no conflict between the decision below and the decisions of other courts of appeals. In *Van Horn* v. *Gulf Atlantic Towing Corp.*, 388 F. 2d 636 (C.A. 4), the court merely held that where a dangerous condition was created prior to the time that a shipowner delivered his vessel to drydock for repair, the shipowner was under a duty to exercise reasonable care to provide a safe place to work with respect to that condition. In *White* v. *United States*, 400 F. 2d 74 (C.A. 4), the court held that recovery would lie if the shipowner

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[3] Petitioner's assertions that the paint cans had "flimsy" handles (Pet. 6) and that better constructed containers were "generally used" (Pet. 7) are not supported by the cited appendix references.

[4] In any event, petitioner's reliance (Pet. 15–16) on *Albanese* v. *N.V. Nederl. Amerik Stoomv. Maats.*, 382 U.S. 283, and *United Pilots Ass'n.* v. *Halecki*, 358 U.S. 613, as establishing the existence of such a duty, is misplaced. *Albanese* involved an injury occurring on a live ship which was in the control of its owner, while *Halecki*, as this Court explained in *West*, 361 U.S. at 124, involved a shipowner who was in control of the repair work to the extent that it had directed the use of a dangerous substance.

had assumed the duty to provide a firewatch but had failed to carry it out properly. Here, by contrast, the government assumed no duties and the alleged unsafe condition arose from the repair work after the government had relinquished control.[*]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.
MORTON HOLLANDER,
MICHAEL C. FARRAR,
Attorneys.

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[*] Nor is there conflict with *Stark* v. *United States*, 413 F. 2d 253 (C.A. 5), which fully recognizes that when the work of repair creates the dangerous condition, no obligation may be placed on the shipowner. *Aldridge* v. *States Marine Corp. of Delaware*, 265 F. 2d 554 (C.A. 9), certiorari denied, 361 U.S. 814, also relied on by petitioner, is inapposite. It involved a longshoreman who was injured while unloading a live vessel, allegedly as the result of the direct refusal of the vesselowner, who had retained control over the vessel, to provide the necessary and appropriate equipment to perform his work.

APPENDIX

Relevant Provisions of the Master Lump Sum Repair Contract governing the reactivation of the SS CAPE SAN MARTIN (*Baum* injury)

ARTICLE 5. *Drydocking and Berthing.*

(a) On entering and leaving a yard, pier, dry dock or marine railway, the Contractor shall have charge of and be responsible for the vessel within the limitations of this contract from the time the Contractor's lines are secured to the vessel until such time as all of the Contractor's lines are cast off.

* * * * *

ARTICLE 4. *Workmanship and Inspection.*

(a) Unless otherwise specifically provided in the job order all workmanship, equipment, materials and articles, and all operational practices of the Contractor used in the performance of the work, shall be the best commercial marine practice and shall be of a suitable grade of their respective kinds. All work performed by the Contractor shall comply

Relevant Provisions of the Master Lump Sum Repair Contract governing the reactivation of the SS MARY AUSTIN (*West* injury)

15. *Drydocking; Miscellaneous.*

(a) On entering and leaving a dry dock or marine railway, the Contractor shall have charge of and be responsible for a vessel not operating under its own power from the time the Contractor's lines are secured to the vessel until such time as all of the Contractor's lines are cast off.

* * * * *

11. *Workmanship, Inspection and Guarantees.*

(a) Unless otherwise specifically provided in the plans or specifications, all workmanship, equipment, materials and articles, and all operational practices of the Contractor used in the performance of a job order or supplemental job order, shall be in accordance with the American Bureau of Shipping rules, the requirements of the Merchant Marine

with the requirements of the American Bureau of Shipping, the United States Coast Guard, and other regulatory bodies in accordance with the rules of said regulatory bodies. * * *

ARTICLE 4. *Workmanship and Inspection.*

* * * * * *

(f) At the request of the authorized representative of the Authority the Contractor shall place reasonable safeguards and shall put and keep at all times sufficient lights to prevent accidents in spaces and areas in which the Contractor will be required to perform or has started work and to provide safe access and egress to and from the vessel.

* * * * *

ARTICLE 9. *Indemnity and Insurance.*

(a) The Contractor shall exercise reasonable care and use its best efforts to prevent accidents, injury or damage to all employees, persons and property in and about the work, and to the vessel or portion thereof upon which work is done.

* * * * *

Inspection of the Coast Guard, and the best commercial marine practice and shall be of a suitable grade of their respective kinds.

* * * * *

15. *Drydocking; Miscellaneous.*

* * * * *

(i) The Contractor shall place proper safeguards for the prevention of accidents, and shall put up and keep at night suitable and sufficient lights where necessary during the prosecution of the work.

* * * * *

12. *Indemnity and Insurance.*

(a) The Contractor shall exercise reasonable care and use its best efforts to prevent accidents, injury or damage to all employees, persons and property in and about the work, and to the vessel or portion thereof upon which work is done.

* * * * *

ARTICLE 4. *Workmanship and Inspection.*	11. *Workmanship, Inspection and Guarantees.*
* * * * *	* * * * *
(c) During the Contractor's performance thereof, the work shall be subject to inspection and test by the authorized representative of the Authority at any and all times and places, and any part of the work may be rejected by said representative of the Authority if not as specified or because of defective workmanship or materials. Any portion of the work so rejected shall forthwith be replaced or corrected by the Contractor at its own cost and expense.	(c) (i) During the Contractor's performance thereof, the work shall be subject to inspection and test by the Repair Representative at any and all times and places, and any part of the work may be rejected by the Repair Representative if not as specified or because of defective workmanship or materials; any portion of the work so rejected shall forthwith be replaced or corrected by the Contractor at its own cost and expense. * * *
* * * * *	* * * * *
ARTICLE 26. *Default.*	6. *Delays; Termination.*
(a) The United States may, subject to the provisions of paragraph (b) below, by written Notice of Default to the Contractor, terminate the whole or any part of the work covered by a job order in any one of the following circumstances:	(a) If the Contractor is adjudged a bankrupt, or if it makes a general assignment for the benefit of its creditors, or if a receiver is appointed on account of its insolvency, or if it persistently or repeatedly refuses or fails (except in cases for which extension of time is provided) to supply enough properly skilled workmen or proper materials, equipment and facilities, or if it refuses or fails to prosecute the work or any part thereof,
(i) If the Contractor fails to perform the work within the time specified in the job order or any extension thereof; or	

(ii) If the Contractor fails to perform any of the other provisions of this contract or the job order issued hereunder, or so fails to make progress as to endanger performance of the job order in accordance with its terms.

* * * * *

with such diligence as will insure its completion on or before the completion date, or if it fails so to complete said work within such time, the Contracting Officer or the Repair Representative may, by written notice to the Contractor and without prejudice to any other right or remedy of the Administrator, terminate the Contractor's right to proceed with the work or such part of the work as to which there has been delay. * * *

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